No. 12907

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, DISTRICT NO. 1, ACTING ON BEHALF OF SHIP CLERKS ASSOCIATION, LOCAL 34 AND LOCAL 34, MARINE CLERKS ASSOCIATION, LOCAL 1-63, AND SUPER CARGOES AND CHECKERS UNION, LOCAL 40, EACH AFFILIATED WITH INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, C. I. O., RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, *et seq.*),[1] for the enforcement of its order (R.

[1] Relevant provisions of the Act appear in the Appendix, *infra*, p. 14–18.

382–389) issued on July 20, 1950, against the respondents herein,[2] following the usual proceedings under Section 10 of the Act. The Board's Decision and Order are reported in 90 N. L. R. B. 1021. This Court has jurisdiction under Section 10 of the Act, the unfair labor practices having occurred within this judicial circuit.

STATEMENT OF THE CASE

Following the customary proceedings under Section 10 of the Act, the Board found that the respondent unions violated Section 8 (b) (2) of the Act by causing the Employers[3] to discriminate against nonmembers of the unions in violation of Section 8 (a) (3). The issues before this Court are:

(1) Whether the Board properly found that respondents, by entering into and enforcing contracts

[2] International Longshoremen's and Warehousemen's Union, CIO; International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34 and Local 34, Marine Clerks Association, Local 1–63, and Super Cargoes and Checkers Union, Local 40.

[3] The Employers, charging parties in this case, are members of the following associations: Waterfront Employers Association of the Pacific Coast (WEA), Waterfront Employers Association of California (WEAC), Waterfront Employers of Oregon, and the Columbia River (WEOC) (R. 230–235). The individual employer members of these employer associations are enumerated in an appendix to the Trial Examiner's recommended findings at pages 200–212 of the record. Each of the employers, in the course and conduct of its operations, caused and causes a large number of passengers and a substantial tonnage of cargo to be transported to and from various ports on the Pacific Coast, and between such ports and various ports on the East Coast and in the Territories of the United States, and to foreign ports over the customary world trade routes (R. 65–68; 235–240). The Board's jurisdiction is not in issue.

requiring that hiring preference be given to respondents' members, caused the Employers to discriminate respecting employees' membership or nonmembership in a labor organization; and

(2) Whether, following the issuance of a complaint upon unfair labor practice charges, the General Counsel may during the course of the hearing amend the complaint to allege newly committed unfair labor practices which have grown out of those involved in the original charge and complaint.

I

The Board's findings and conclusions [4]

A. Background

Since 1938 the International Longshoremen's and Warehousemen's Union, and certain of its constituents, collectively referred to as respondents, and certain other constituent bodies not parties to the instant proceeding, represented the employees of the Employers herein, in units determined by the Board to be appropriate for collective bargaining purposes. 7 N. L. R. B. 1002; 71 N. L. R. B. 80; 71 N. L. R. B. 121. Collective bargaining agreements between the parties have been in force during the intervening period, and one provision of the latest of such agreements forms the basis for the Board's order in these proceedings (R. 70; 229–230, 232–233, 357, 361–365). The fundamental structure of these agreements is based upon the provisions of an arbitration award rendered in

[4] In the following statement references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

1934 by the National Longshoremen's Board appointed by the President of the United States to mediate an extended strike then in progress (R. 69–71; 267–268, 357). As a direct result of this 1934 award and the subsequent agreements based upon it, the hiring methods and personnel practices in the Longshore industry have developed to their present form (R. 71–85; 330–331). Thus, the inauguration of the joint hiring halls, the establishment of Labor Relations Committees, comprised of union and employer members and headed by impartial chairmen, the selection of hiring hall personnel, and the manner in which employees were registered in the hiring halls and dispatched to job assignments were all embodied in the original award, and have consistently remained in force in all subsequent agreements including those terminating in June 1948, and generally referred to as the Coast Longshore Agreement (R. 71–85; 264–273, 356). Insofar as here relevant the Agreement provided, in substance, that the Employers when hiring would extend preference to Union members, and would hire nonunion employees only when Union members were not available for employment (R. 36, 100; 264–273, 284–285).

B. The 1948 negotiations

On February 13, 1948, the Employers suggested to the respondent Unions that an early conference be held respecting the renewal of the existing agreements in order that due consideration could be given to the problem of conforming existing contracts to the provisions of the Labor-Management Relations Act, 1947,

which had been enacted during the pendency of the then current contracts (R. 103–104; 246–248). Specifically the Employers contended that after June 15, 1948, the terminal date of the contract, the provisions in the Coast Longshore Agreement relating to preference of employment, control of registration, and the hiring hall, would conflict with the Act and that it would be necessary to modify the contract and the various port supplements, to conform to the law (R. 104; 247–248).

Negotiations between the parties began on February 21, 1948, and continued through September 1, at which time, upon the failure of the parties to arrive at an agreement, a strike was called by the respondent labor organizations (R. 104–128; 249–251, 337–338, 354–355). As a consequence of this action all longshore work on the Pacific Coast waterfront ceased, and for the remaining 97 days of the strike commercial shipping on the West Coast was at a virtual standstill (R. 128–130; 337–338, 355).

On or about November 25, representatives of the respondent and the WEA reached agreement, in principle, on the Coast Longshore and Ship Clerks contracts. Beginning about December 2 or 3, picketing diminished. By December 6, pickets were wholly withdrawn, and the longshoremen and ship clerks returned to work. The strike was finally settled on December 6, 1948. (R. 134–135; 373–374.)

C. The hiring preference clause in the contracts

The Coast Longshore contract between the WEA and respondent ILWU, was dated December 6, 1948

(R. 135; 361–365); the Ship Clerks contract, January 17, 1949 (R. 135; 366–368). A Port Supplement to the Ship Clerks contract, between the WEAC and the Marine Clerks Association, Local 1–63, covering the Los Angeles-Long Beach area, was executed March 11, 1949 (R. 135; 368, 373), a Port Supplement and Working Rules, between the WEOC and respondent Checkers and Super Cargoes Local No. 40, covering checkers, supervisors and supercargoes at Portland, Oregon, on March 25, 1949 (R. 135; 370–372). As of the date of the close of the hearing of this case before the Board on April 21, 1949, no Port Supplement covering ship clerks in the Port of San Francisco had been executed (R. 135; 372–373).

Upon the suggestion of respondents' representatives during the negotiations, hiring preference in behalf of the members of respondents' labor organization was provided for in the several agreements entered into by the respondents and the Employers. Thus on August 28, 1948, the Employers advised the respondent ILWU of their "willingness to follow, in substance, the proposal made * * * on March 24, 1948, to continue the present provisions of the contract concerning * * * preference of employment provisions * * *" (R. 37–38; 340). Thereafter on August 31 the Union without specifically noting the Employers' acquiescence in the March 24 proposal, simply reaffirmed it by stating that it proposed the parties "continue the present [preference] provision as is" (R. 37–38; 350). This preference clause as it

appears in the Coast Longshore Agreement, the master contract signed on December 6, 1948, provided as follows:

> Section 7.—*Hiring hall, registration, and preference.*
>
> * * * * *
>
> (d) *Preference.*
>
> Preference of employment shall be given to members of the [ILWU] whenever available. Preference applies both in making additions to the registration list and in dispatching men to jobs. This section shall not deprive the Employers' members of the Labor Relations Committee of the right to object to unsatisfactory men (giving reasons therefor) in making additions to the registration list, and shall not interfere with the making of appropriate dispatching rules (R. 35–36; 365).

The other agreements contained preference clauses substantially in accord with the quoted provisions from the Master Contract (R. 35; 367–368, 372).

At the hearings in this case before the Board it was stipulated between the parties that the registration, hiring, and dispatching procedures then in force were given the same effect as under previous contracts (R. 36; 374). As a result, the Board found, members of respondents' organizations have received preference in employment over nonmembers (R. 36, 156).

Accordingly the Board concluded that by thus entering into contracts which discriminatorily granted preference in employment to members of respondents' organizations, and by actively participating in

the enforcement of such provisions, respondents caused the Employers to discriminate against non-member employees in violation of Section 8 (a) (3) of the Act and thereby violated Section 8 (b) (2) of the Act (R. 36).

II

The proceedings before the Board

Upon an original charge filed by the Employers with the Board on June 10, 1948, alleging that the Unions had violated Section 8 (b) (2) and (3) of the Act, and upon an amended charge filed on August 20, 1948, alleging that the Unions had violated Section 8 (b) (1), the Board on August 20, 1948, issued its complaint (R. 3–15). Insofar as here relevant the charges and the complaint alleged that the Unions by demanding and seeking to enter into a contract with the Employers which provided for preferential hiring of Union members had *attempted to cause* the Employers to discriminate against their employees in violation of Section 8 (a) (3) and had thereby violated Section 8 (b) (2).[5] Thereafter, during the course of the hearing before the Trial Examiner, the complaint was amended to allege that the Unions by actually entering into the aforementioned contracts with the Employers securing preferential hiring of the Unions' members had further attempted to cause and *had caused* the Employers to discriminate against

[5] Briefly stated, Section 8 (a) (3) prohibits employers from discriminating in favor of union members, and Section 8 (b) (2) prohibits unions from *causing or attempting to cause* an employer to violate Section 8 (a) (3). The full text of these provisions is set forth *infra*, pp. 14–15.

their employees in violation of Section 8 (a) (3) thus further violating Section 8 (b) (2) of the Act (R. 25–29). The Trial Examiner and the Board rejected respondents' contention that the absence of an amended *charge* alleging the execution of the illegal contracts precluded the General Counsel from amending the *complaint* to allege the subsequent violation (R. 34–35, 54–56). Accordingly the Board, as noted above, found that by entering into and actively participating in the enforcement of contracts providing for preferential hiring of Union members, respondents caused the Employers to violate Section 8 (a) (3), thereby violating Section 8 (b) (2).

III

The Board's order

The Board's order requires respondents to cease and desist from giving effect to those provisions of collective bargaining agreements between respondents and the Waterfront Employers Association on behalf of itself, and the Waterfront Employers Association of California, the Waterfront Employers of Oregon and Columbia River, and their respective members or its successors, which grant preference in employment to members of any of the respondents. The Board further ordered respondents to cease and desist from causing or attempting to cause the Employers to discriminate against their employees in any like or related manner. The order also requires respondent to post the customary notices of compliance with the Board's order (R. 40–42).

ARGUMENT

Point I

The Board properly found that respondents by entering into and enforcing a contract requiring that hiring preference be given respondents' members caused the Employers to violate Section 8 (a) (3) of the Act

The facts summarized above, pp. 3–7, establish that respondents entered into a contract with the Employers under which Union members were to be given preference in hiring, that respondents assisted in the enforcement of the preferential hiring provisions, and that as a result members of respondents received preference in employment over nonmembers. The mere execution of such a contract, even apart from its actual enforcement, constitutes "discrimination in regard to hire" on the part of the Employers and hence falls squarely within the prohibition of Section 8 (a) (3), as this Court early recognized in *N. L. R. B.* v. *National Motor Bearing Co.,* 105 F. 2d 652, 660. Since the respondent Unions joined in the execution of these illegal contracts and assisted in enforcing them, it follows that the Unions "cause[d] * * * an employer to discriminate against an employee in violation of [Section 8 (a) (3)]", thus violating Section 8 (b) (2).[6] *N. L. R. B.* v. *National Maritime Union of America,* 175 F. 2d 686, 689 (C. A. 2), cer-

[6] There is no suggestion that the Employers by economic pressure upon the respondents compelled them to execute the contracts. But even had the unions been subjected to such "economic duress" this would "afford them no defense," as this Court recently observed in *N. L. R. B.* v. *Fry Roofing Co.*, No. 12775, decided November 30, 1951; see also cases cited in n. 5 of the decision in the *Fry* case.

tiorari denied, 338 U. S. 954; *International Union, United Mine Workers of America* v. *N. L. R. B.*, 184 F. 2d 392 (C. A. D. C.), certiorari denied, 340 U. S. 934; *N. L. R. B.* v, *American Radio Ass'n* (C. A. 2), consent decree entered December 28, 1950, enforcing 82 N. L. R. B. 1344.[7]

Point II

The amendments to the complaint offered at the hearing with respect to recent violations growing out of the matters then in litigation were valid and proper

As stated above, p. 8, the original complaint alleged that respondents violated Section 8 (b) (2) by attempting to cause the Employers to violate Section 8 (a) (3). Respondents in their Answer denied violating that Section and attacked its validity (R. 17–19). At the hearing before the Trial Examiner, the General Counsel amended the complaint to allege that by executing and enforcing the contracts in question respondents had further violated Section 8 (b) (2) by causing the employer to violate Section 8 (a) (3). Respondents in this Court renew their contention that the amendment was improper in the absence of a supporting charge (R. 31, 392).

The propriety of thus amending the complaint is established by the Supreme Court's decision in *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 369, where the Court stated that nothing in the Act—

[7] The proviso to Section 8 (a) (3) permitting under certain conditions the execution and enforcement of contracts requiring union membership as a condition of employment furnishes no defense in the instant case, for the agreements here in issue resulted in discrimination in *hiring* and did not allow the thirty-day period required by the proviso. See *infra*, p. 14.

> precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. The violations alleged in the complaint and found by the Board were but a prolongation of the attempt * * * to secure the contracts alleged in the charge. All are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken.

See also *Consolidated Edison Co.* v. *N. L. R. B.,* 305 U. S. 197, 225. The rule is unchanged under the amended Act; see *Kansas Milling Co.* v. *N. L. R. B.,* 185 F. 2d 413, 415 (C. A. 10); *N. L. R. B.* v. *Westex Boot & Shoe Co.,* 190 F. 2d 12, 13–14 (C. A. 5); *American Shuffleboard Co.* v. *N. L. R. B.,* 190 F. 2d 898, 903–904 (C. A. 3); *N. L. R. B.* v. *Kingston Cake Co.,* 191 F. 2d 563, 567 (C. A. 3); *Cathey Lumber Co.,* 86 NLRB 157, 162, enforced 185 F. 2d 1021 (C. A. 5), decree vacated on other grounds, 189 F. 2d 428; *N. L. R. B.* v. *Bradley Washfountain Co.,* 29 L. R. R. M. 2064, 2067 (C. A. 7, decided November 1, 1951). As the court stated in the case last cited:

> Under the present act, as well as its predecessor, the function of the charge is to set in motion the Board's investigatory machinery in order to ascertain whether a complaint shall issue; it is not a pleading; it has served its purpose when the Board embarks upon an in-

quiry. [Citing cases.] The controversy between the Board and the employer begins with the complaint prepared by the Board. [Citing case.] *Consequently it is without significance that the complaint was broader than the original charge.* The latter called upon the Board to make inquiry and, if thought proper, to file a complaint. In pursuance of its administrative duty, the Board, in due course, issued its complaint and thereupon the controversy between the Board and respondent came into existence. Nothing that transpired before the filing of the complaint in anywise limited the right of the Board to include in it the specific charges which it contained. [Emphasis supplied.][8]

CONCLUSION

The Board properly found that respondents had violated Section 8 (b) (2) and its order, which is in the customary form, should be enforced.

Respectfully submitted.

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JANUARY 1952.

[8] See also *N. L. R. B.* v. *Kobritz*, C. A. 1, No. 4581, decided December 17, 1951, slip opinion, pp. 10–15.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, *et seq.*),[9] are as follows:

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an

[9] The Act was further amended, in a manner not material here, by Public Law 189, 82nd Cong., 1st Sess., enacted October 22, 1951.

agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent

or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the

opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or

agency, shall be considered by the court, unles
the failure or neglect to urge such objectio
shall be excused because of extraordinary cir
cumstances. The findings of the Board wit
respect to questions of fact if supported b
substantial evidence on the record considere
as a whole shall be conclusive. * * *

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